

**SUMMARY OF RECENT  
WV CAMPAIGN FINANCE LEGISLATION  
2005 - 2009**

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## **Introduction**

On behalf of the West Virginia State Legislature, we appreciate the invitation and opportunity to participate in the public hearing that the West Virginia Independent Commission on Judicial Reform has scheduled at Marshall University on Friday, August 28, 2009. The following summary has been prepared for and in conjunction with the joint presentation of Delegate Carrie Webster, Chairwoman, Committee on the Judiciary, West Virginia House of Delegates; and the Honorable Jeff Kessler, Chairman, Committee on the Judiciary, West Virginia State Senate.

This summary includes a description of significant campaign finance legislation enacted by the West Virginia Legislature between 2005 and 2009, intended to promote more open, honest, and accountable government. These legislative reforms include disclosure requirements intended to inform voters about potential influences on elected officials, and contribution limits that help to mitigate the real and perceived influence of donors on those officials. We hope the Commission will find this summary of the West Virginia Legislature's attempts to safeguard the integrity of the electoral process helpful in its deliberations.

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Legislative enactments in 2005 were a result of events preceding the 2004 West Virginia Supreme Court of Appeals election in which third parties spent approximately \$3.5 million -- in addition to \$2.8 million raised by the two candidates. Much of this spending was by 527 political organizations, tax-exempt organizations governed by the United States tax code, 26 U.S.C. § 527. As a result of serious shortcomings in both the law and the disclosure system established by the Internal Revenue Service, it was difficult, sometimes impossible, to get the full story about contributions to 527s and how the 527 spent those contributions. The 2005 reforms were intended to address the proliferation of 527 political organizations by placing a limit on contributions to 527s and requiring that they register with the Secretary of State.

The other significant change in 2005 was to require the disclosure of contributions used to

electioneering communications 30 days prior to a primary election and 60 days prior to a general election.

Further, this legislation placed limits on the amount political organizations defined in Section 527 (e) (1) of the Internal Revenue Code of 1986 can accept as contributions prior to a primary or general election to no more than \$1,000 from any one person. These limitations do not apply to contributions made for the purpose of supporting or opposing a ballot issue, including a constitutional amendment. Prior to the enactment of H.B. 402, there were no limitations on the amount a 527 organization could accept as a contribution. Additionally, the legislation prohibited 527s from soliciting or accepting contributions until it has notified the Secretary of State of its existence and of the purposes for which it was formed. And finally, the Legislature made it unlawful for any person to create, establish or organize more than one 527 political organization with the intent to avoid or evade contribution limitations.

#### *Detailed Description of the Provisions of H.B. 402*

##### **Electioneering Communications**

An electioneering communication is any paid communication made by broadcast, cable or satellite signal, mass mailing, telephone bank, leaflet, pamphlet, flyer or outdoor advertising or published in any newspaper, magazine or other periodical that fulfills each of the following conditions:

- ☐ refers to a clearly identified candidate;
- ☐ publicly distributed shortly before an election for the office that candidate is seeking; and
- ☐ is targeted to the relevant electorate.

(*W. Va. Code* § 3-8-1a (10)).

##### **Clearly Identified Candidate**

A candidate is clearly identified when the candidate's name, nickname, photograph, drawing or other depiction of the candidate appears or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the Governor", "your Senator" or "the incumbent", or through an unambiguous reference to his or her status as a candidate such as "the Democratic candidate for Governor" or "the Republican candidate for Supreme Court of Appeals". (*W. Va. Code* § 3-8-1a (5)).

##### **Publicly Distributed Shortly Before Election**

Generally, a communication is publicly distributed if it is disseminated by broadcast, cable or satellite signal, mass mailing, telephone bank, leaflet, pamphlet, flyer or outdoor advertising or

advocacy for or against a specific piece of legislation pending before the legislature, urges the audience to communicate with a member or members of the legislature concerning a specific piece of legislation.

- ☐ a statement or depiction by a membership organization, in existence prior to the time during which the candidate named or depicted became a candidate, made in a membership organization's communication distributed only to the members of that organization.
- ☐ a communication made solely for the purpose of attracting public attention to a product or service offered for sale by a candidate or by a business owned or operated by a candidate which does not mention an election, the office sought by the candidate or his or her status as a candidate; or
- ☐ a communication, such as a voter's guide, which refers to all of the candidates for one or more offices, which contains no appearance of endorsement for or opposition to the nomination or election of any candidate and which is intended as nonpartisan public education focused on issues and voting history.

*(W.Va. Code § 3-8-1a (10) (B) (I)-(viii)).*

### **Disclosure Requirements**

#### **> When to File**

Persons who make electioneering communications that aggregate more than \$5,000 in the calendar year must file a disclosure with the Secretary of State within 24 hours of the disclosure date.

*(W.Va. Code § 3-8-2b (a)).*

#### **> Disclosure Date**

The direct costs of purchasing, producing or disseminating electioneering communications must be disclosed on:

- ☐ The first date on which an electioneering communication is publicly distributed, provided that the person making the electioneering communication has made disbursement(s), or has executed contract(s) to make disbursements, for the direct costs of producing or airing one or more electioneering communication aggregating in excess of \$5,000; or
- ☐ Any other date during the same calendar year on which an electioneering communication is publicly distributed, provided that the person making the

paid exclusively from that bank account.

*(W.Va. Code § 3-8-2b (a)).*

#### **Statement of Attribution**

Every electioneering communication must include a statement presented in a clear and conspicuous manner that:

- ☐ clearly indicates that the electioneering communication is not authorized by the candidate or the candidate's committee; and
- ☐ clearly identifies the person making the expenditure for the electioneering communication.

When the electioneering communication appears on television this statement must be both spoken clearly and appear in clearly readable writing at the end of the communication.

*(W.Va. Code § 3-8-2b (d)).*

#### **Contribution Limitations**

A political organization as defined in Section 527 (e) (1) of the Internal Revenue Code of 1986 may not accept contributions totaling more than \$1,000 from any one person prior to the primary election and contributions totaling more than \$1,000 from any one person after the primary and before the general election. *(W.Va. Code § 3-8-12 (g)).*

These limitations on contributions do not apply to contributions made for the purpose of supporting or opposing a ballot issue, including a constitutional amendment. *(W.Va. Code § 3-8-12 (p)).*

Additionally, political organization defined in Section 527(e)(1) of the Internal Revenue Code of 1986 may not solicit or accept contributions until it has notified the Secretary of State of its existence and of the purposes for which it was formed.

Finally, it is unlawful for any person to create, establish or organize more than one political organization as defined in Section 527(e)(1) of the Internal Revenue Code of 1986 with the intent to avoid or evade contribution limitations. *(W.Va. Code § 3-8-12 (h)).*

This section contains provisions related to maintaining records of receipts and expenditures which are made for political purposes. Subsection (b) was amended to provide that independent expenditure made after on or after the 15th day but more than 12 hours before the day of any election must be reported within twenty-four hours. Prior to this change the law provided for reporting of expenditures made after the 11th day before the election. However, persons making expenditures in the amount of \$1,000 or more for any statewide or legislative candidate must report the expenditure in accordance with section 2-b (Disclosure of Electioneering Communications) and not pursuant to this section.

#### **§3-8-2b. Disclosure of electioneering communications.**

This section contains provisions for the reporting of contributions used to purchase, produce or disseminate electioneering communications. The section was amended to make the timing of the reports consistent with other provisions of the article.

#### **§3-8-3. Committee treasurers; required to receive and disburse funds.**

The section contains provisions relating to the political committee treasurers and their duties. A technical amendment was made to clarify the types of committee being regulated by the section.

#### **§3-8-4. Treasurers and financial agents; written designation requirements.**

The section contains the specific duties of treasurers of political committees. The section was reorganized so that subsection (a) applies to treasurers of any political action committee or political party committee supporting, aiding or opposing the nomination, election or defeat of any candidate for an office encompassing an election district larger than a county unless a written statement of organization, on a form to be prescribed by the Secretary of State, is filed with the Secretary of State at least 28 days before the election

Subsection (b) applies to treasurers of any political committee of candidates for a state-wide office or to the election for an office encompassing an election district larger than a county or to any legislative office. Subsection (c) applies to requirements for treasurers of committee for candidates for offices within a county.

#### **§3-8-5. Detailed accounts and verified financial statements required.**

The section provides specific requirements for financial statements to be filed by candidates, treasurer, person and other to keep detailed accounts of contributions and expenditures.

The section was amended with regard to the time periods for reporting:

- ☐ financial transactions, exceeding \$500, that take place before the last Saturday in March, must be filed within 6 days and annually whenever the

### **§3-8-5e. Precandidacy financing and expenditures.**

This section contains provisions relating to pre-candidacy contributions and expenditures. Several technical amendments were made to the section. Subsection (c) was amended to provide that financial information relating to contributions and expenditures shall be filed annually on the last Saturday in March, or within 6 days preceding a election rather than on the last Saturday in March or within 15 days after preceding the election.

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## **2008 - Committee Substitute for H.B. 219**

### *Summary of the Provisions of H.B. 219*

During the 2<sup>nd</sup> Extraordinary Session of 2008, the Legislature enacted Committee Substitute for H.B. 219 in response to an order of the United States Court for the Southern District of West Virginia in the matter of *Center for Individual Freedom v. Ireland, et. al.*, (CFIF) which granted the plaintiff CFIF, a preliminary injunction that enjoined the State from enforcing several provision of the State's campaign finance laws as violating the First Amendment of the United States Constitution.

The bill modified provisions of the state's campaign finance laws in an attempt to comply with the order of the U.S. District Court, while also amending certain sections of current law ruled to be unconstitutional by the Court. The legislation clarified that prohibitions on political activity by corporations only applied to "express advocacy" or to speech that is functionally equivalent to express advocacy. The legislature also included language that provides that corporations may make disbursements for political purposes unless the communication is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate. A "safe harbor" was included that provides specific guidance as to the content of permissible communications.

Additionally, the bill modified the definition of electioneering communication by removing certain types of non-broadcast media subject to disclosure requirements and replacing the phrase "outdoor advertising" with the phrase "billboard advertising." Finally, robust legislative findings were included to explain why such regulation is needed.

### *Detailed Description of the Provisions of S.B. 713*

#### *Background*

Senate Bill 713 was drafted in response to an injunction order issued by the U.S. District Court for the Southern District of W.Va. in *Center for Individual Freedom, Inc. (CFIF) v. Ireland,*

### **§3-8-1. Provisions to regulate and control elections.**

The section was amended to include specific legislative findings to support the legislature's decision to require disclosure for electioneering communications utilizing various forms of non-broadcast media.

#### **§ 3-8-1a. Definitions.**

This section was amended to include new definitions for the phrases "expressly advocating," "Functional equivalent" and "restricted group." The following definitions were amended in conformance with federal law: "independent expenditure" and "mass mailing." A definition for "billboard" was added so as to more clearly distinguish the advertising intended to be covered by the definition of "electioneering communication." Finally, the definition of "electioneering communication" was amended to remove the terms: leaflet, pamphlet, and flyer.

#### **§ 3-8-4. Treasurers and financial agents; written designation requirements.**

This section was amended to correct a code citation resulting from changes to section 1a.

#### **§ 3-8-5. Detailed accounts and verified financial statements required.**

This section was amended to remove unconstitutional language that would impose reporting requirements on corporations engaged in "issue advocacy."

#### **§ 3-8-8. Corporation contributions forbidden; exceptions; penalties; promulgation of rules; additional powers of State Election Commission.**

Amendments to section 8 simplified the prohibited conduct described in subsection (a) by simply prohibiting corporation from making a contribution or expenditure for the purpose of expressly advocating or its functional equivalent the election or defeat of a clearly identified candidate. The intent of this change was to remove unconstitutional language that would impose reporting requirements on corporations engaged in "issue advocacy."

Paragraph (H), of subdivision (2), subsection (b) was also amended to clarify that the corporations may not use their property, real or personal, facilities, equipment, materials or services for the purpose of expressly advocating, or its functional equivalent, the election or defeat of a clearly identified candidate.

#### **§ 3-9-14. Unlawful acts by corporations; penalties.**

The provisions of this section were amended to remove language that would unconstitutionally prohibit corporations from engaging in "issue advocacy." Additionally, definitions for the phrases "clearly identified", "express advocacy" and "functionally equivalent"

- business corporations; and
- If unable, for good cause, to demonstrate through accounting records, has a written policy against accepting donations from business corporations or labor organizations; and
- It is described in 26 U.S.C. 501(c)(4).

Finally, the bill modified the definition of “targeted to the relevant electorate” to make it more proportionate with federal election law. Under current law, a communication is considered to be an “electioneering communication” if it refers to a clearly identified candidate for a statewide office or the Legislature; is made within 60 days before a general or special election or 30 days before a primary election; is targeted to the relevant electorate; and advocates the nomination, election or defeat of the candidate. Currently, “targeted to the relevant electorate” is defined as a communication which refers to a clearly identified candidate for statewide office or the Legislature and which can be received by 10,000 or more individuals in the state in the case of a candidacy for statewide office, and 500 or more individuals in the district in the case of a candidacy for the Legislature.

H.B. 3337 would have modified the definition of “targeted relevant electorate” to make the number of individuals who may receive the communication proportionate to the number necessary under federal law — 50,000 individuals. Thus, if enacted for a communication to be considered as an electioneering communication it be capable of being received by 140,000 or more individuals in the state in the case of a candidacy for statewide office, 8,220 or more individuals in the district in the case of a candidacy for the State Senate or 2,410 or more individuals in the district in the case of a candidacy for the House of Delegates.

H.B. 3337 passed the House of Delegates on April 1, 2009. However, when taken up by the Senate Committee on the Judiciary, the bill did not receive the votes of a majority of the Committee’s members and thus was not reported to the Senate floor.